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ELDER EXPLOITATION THROUGH PREDATORY MARRIAGE

Dorota Miler*

***Abstract:** The paper exposes a pattern of exploitation wherein financially motivated caregivers manipulate elders into marrying them to access and, subsequently, to inherit their estate. The article presents, analyzes and defines a case of predatory marriage. Further, it critically considers suggestions proposed by Canadian scholars and provides an alternative remedy, developed through comparative study of Canadian, Californian and German law. Through the paper, the author intends to inspire further, fruitful debate.*

INTRODUCTION

Canadian common law does not protect a person from being financially exploited, manipulated into marriage, and unduly influenced into making a new will by a person entrusted with

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The subject of the article is further elaborated in my Master's Thesis "Deeming a Predatory Spouse Unworthy to Inherit under Canadian Common Law" (submitted under the name Dorota Bogajewska) written under supervision of professor Angela Campbell submitted to McGill University in August 2012 in partial fulfillment of the requirements of the degree of Master of Laws.

his or her care.¹ This is especially problematic with regard to elders who, due to their age and medical conditions, may require assistance in their daily affairs² and may have accumulated significant assets throughout their life.³ This situation is attractive to individuals who perceive financial opportunity by defrauding the elder's estate.

This paper will focus mainly on the characteristics of and measures to prevent a marriage between an elder and his or her financially motivated caregiver (hereinafter referred to as "predatory marriage"), who exploits their dependency relationship to gain financial benefits.⁴ It is recognized that classifying people with regard to their age, especially with respect to the elderly, may perpetuate stereotypes;⁵

¹ The problem of predatory marriages is considered within the framework of Canadian common law provinces. Neither statutory law nor case law from Quebec is examined.

² According to a report of the Public Health Agency of Canada approximately 1 in 10 elderly has Alzheimer's disease or other dementias, 89% of people 65 years and older suffer from "at least one chronic condition" and about 27% of the elderly are in need of care "due to a long-term health problem." Most of them (72%) receive this help from informal sources, see "The Chief Public Health Officer's Report on The State of Public Health in Canada in 2010", online: Public Health Agency of Canada <www.phac-aspc.ca>.

³ E.g. approximately 60% of elders own a house, see "Report of the National Seniors Council on Low Income Among Seniors" (2009), online: National Seniors Council <www.seniorcouncil.gc.ca>.

⁴ It is possible to imagine that any situation in which an imminent death of one of the spouses impends could be classified as a "predatory marriage", for example a situation of a terminally ill young person; see Terry L Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America" (2008) 96 KY LJ 275.

⁵ See e.g. Carolyn L Dessin, "Financial Abuse of the Elderly: Is the Solution a Problem?" (2002-2003) 34 McGeorge L Rev 267 at 292ff;

nevertheless, our ageing society⁶ and the many examples of elder abuse show that members of this group are particularly exposed to abuse and exploitation.⁷

The issue of predatory marriages is discussed in three steps. First, its characteristics and the relevant case law are studied. Second, the dangers of a predatory marriage from social and legal perspectives are presented. Finally, solutions preventing predatory marriages, provided by Canadian scholars and introduced in other jurisdictions (California, Germany), are explored.

Sue Westwood, "I May Be Older, But I Ain't No 'Elder'": A Critique of "Elder Law" (2011-2012) 21 Temp Pol & Civ Rts L Rev 485.

⁶ Statistics show that:

As of July 1, 2010, 4,819,600 seniors aged 65 years and over accounted for 14.1% of the Canadian population, up from 13.9% one year earlier. In 1971, 8.0% of the population were seniors and there has been a steady increase during the last forty years. Population ageing in Canada is expected to accelerate between 2011 and 2031, as all people in the large cohort of baby boomers reach their senior years. Projections show that seniors could account for more than one-fifth of the population as soon as 2026 and could exceed one-quarter of the population by 2056. (Anna Milan, "Age and Sex Structure: Canada, Provinces and Territories, 2010 (*Report on the Demographic Situation in Canada*)" online: Statistics Canada <<http://www.statcan.gc.ca/start-debut-eng.html>>).

⁷ See "Elder Abuse: A Growing Dilemma in an Aging Population", CBC News (1 March 2011), online: CBC News <www.cbc.ca>; Phyllis Marie Vetere, "Elder Abuse: What Are We Missing?" (2011) 57:7 Canadian Family Physician 783 at 783ff; The National Seniors Council, "Report of the National Seniors Council on Elder Abuse" (November 2007), online: National Seniors Council <<http://www.seniorscouncil.gc.ca/>>, in which it is estimated that "between 4 percent and 10 percent of older adults in Canada experience some type of abuse."

PREDATORY MARRIAGE

Definition of Predatory Marriage

There is no established name for a marriage through which a financially motivated caregiver exploits an elder.⁸ For the purpose of this paper, the term “predatory marriage” will be employed to refer to such marriages.⁹ Its features are distinguished on the basis of the relevant case law and literature.

A predatory marriage is composed of a victim spouse and a predatory spouse. The victim spouse depends on assistance in dealing with daily physical affairs and, because of decreasing mental power, lacks coherent thought to resist influence and recognize its consequences. The predatory spouse is the victim spouse’s primary caregiver, who exploits the position to gain access to the victim spouse’s assets and, through marriage and a subsequent will, acquires legal rights to the spouse’s estate.

⁸ C.f. Wendy L Griesdorf, “Crazy in Love: Caregiver Marriages in the Context of Estate Disputes” (2005-2006) 25 ETPJ 315 at 316; Albert H Oosterhoff, “Foreword” in Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, 1d ed (Aurora, ON: The Cartwright Group, 2010) 1 at 1 [Oosterhoff, “Foreword”]; Kimberly Whaley et al, *Capacity to Marry and the Estate Plan*, 1d ed (Aurora, ON: The Cartwright Group, 2010) at 70 [Whaley, *Capacity to Marry*].

⁹ Griesdorf and Oosterhoff also call it a “predatory marriage” or a “caregiver marriage” (Griesdorf, *supra* note 8 at 326; Albert H Oosterhoff, “Predatory Marriages” (2013-2014) 33 ETPJ 24 [Oosterhoff, “Predatory Marriages”]). In Monica Boyd & Anne Li, “May-December: Canadians in Age-Discrepant Relationships” (2003) 70 StatCan 29, this type of marriage is called “May-December Marriage.” Oosterhoff defines predatory marriage at pages 26-27 of his above-mentioned article.

The union between the two persons generally takes the form of marriage,¹⁰ although common law cohabitation is also a possibility, if the provincial legislation provides both spouses and partners with equal property rights and equal access to personal assets.¹¹ In most provinces, the surviving spouse or (when applicable) partner is equipped with significant rights. For example, in Ontario, a spouse acquires, *inter alia*, the right to inherit a substantial part of the estate on intestacy under the *Succession Law Reform Act* (the preferential share, which currently amounts to \$200,000 and a distributive share which varies from one-half to one-third of the estate's residue);¹² the claim for support out of the estate under Part V of the *Succession Law Reform Act*;¹³ and the right to "an equalizing

¹⁰ A relationship between two people may have some features of a predatory relationship, even when the parties do not marry or live in a spousal relationship; see e.g. *Vout v Hay*, [1995] 2 SCR 876, 125 DLR (4th) 431 [*Vout*].

¹¹ The problem of predatory relationships has been discussed also in the context of common law marriages, e.g., *Keljanovic Estate v Sanseverino* (2000), 186 DLR (4th) 481.

¹² *Succession Law Reform Act*, RSO 1990, c S-26, s 45 [*Succession Law Reform Act*]; in most other provinces legislation provides spouses or (when applicable) partners with a right to a preferential share which, depending on the province, amounts from 50,000 Dollars (e.g. Manitoba and Nova Scotia) to 300,000 Dollars (British Columbia). The spouses or (when applicable) partners are also entitled to a distributive share in the residue; see relevant legislation e.g.; *Intestate Succession Act*, RSNS 1989, c 236; *The Intestate Succession Act*, CCSM c I85; *The Intestate Succession Act*, 1996, SS 1996, c I-13.1; *Wills and Succession Act*, SA 2010, c W-12.2 [*Wills and Succession Act*]; *Wills, Estates and Succession Act*, SBC 2009, c 13 [*Wills, Estates and Succession Act*].

¹³ *Succession Law Reform Act*, *supra* note 12 s 57; a surviving spouse or (when applicable) partner can apply for support out of the estate also in other provinces e.g. *Dependants Relief Act*, CCSM c D37 s 2; *The Dependants' Relief Act*, 1996, SS 1996, c D-25.01 s 3; *Wills and*

payment from the deceased's estate if the survivor's net family property is less than that of the deceased" under Part I of the *Family Law Act*.¹⁴

The declining health of the victim spouse makes it difficult for him or her, or for his or her family or friends, to nullify the marriage or question its validity. In most cases, the victim spouse lives for an insufficient time to be convinced that he or she is being taken advantage of or to initiate, let alone bring to fruition, legal action.¹⁵ After death, the effects of marriage can be nullified on a request of a third party only if the marriage was void. Marriage is the most elementary of contracts, with a particularly low entry threshold.¹⁶ Only in a few cases has it been established that the victim spouse did not

Succession Act, *supra* note 12 s 88; *Wills, Estates and Succession Act*, *supra* note 12 s 60.

¹⁴ Albert H Oosterhoff, "Consequences of a January/December Marriage: a Cautionary Tale" (1998-1999) 18 ETPJ 261 at 272 [Oosterhoff, "Consequences"]; *Family Law Act*, RSO 1990, c F 3 s 5(2); the surviving spouse is entitled to one-half of the excess of the difference between "the net family property of the deceased" and "the net family property of the surviving spouse." See Albert H Oosterhoff, "Barrett Estate v Dexter", Case Comment (2000-2001) 20 ETPJ 115 at 120-121 [Oosterhoff, "Barrett Estate"]. In some provinces, e.g. Manitoba, statutes also provide for equalization, see *Family Property Act*, CCSM c F25 s 25 [*Family Property Act*]; statutes of other provinces e.g. in Alberta, British Columbia und Saskatchewan, do not allow equalisation of assets on a death of one of the spouses or (when applicable) partners, see *Family Law Act*, SBC 2011, c 25; *Matrimonial Property Act*, RSA 2000, c M-8; *The Family Property Act*, SS 1997, c F-6.3 s 30; Oosterhoff also lists other rights of a surviving spouse, see Oosterhoff, "Predatory Marriages", *supra* note 9 at 49-50.

¹⁵ See Turnipseed, *supra* note 4: but this does not always have to be the case, see e.g. *Juzumas v Baron* (2012), 2012 ONSC 7220 [*Juzumas*].

¹⁶ Oosterhoff, "Consequences", *supra* note 14 at 271.

have the capacity to marry.¹⁷ *Inter alia*, lack of consent, duress, and fraud causes marriages to be voidable, but not void; and, in that case, their validity can be challenged only by the spouses and only while they are alive.¹⁸

A person is vulnerable if his or her daily existence depends on the help of another person. He or she still possesses legal capacity, but his or her mental or physical capability is diminished due to depression, dementia or some other disorder. As a result, he or she has difficulty caring for him- or herself and requires assistance, for instance with cooking or cleaning. He or she may also require professional help due to severe diseases such as cancer or Parkinson's. The inevitable need for a caregiver and the fear of losing one are important decision-making factors. The vulnerable person may become enchanted with the caregiver and start seeing him or her as indispensable for his or her survival.¹⁹ Unable to imagine life without external support and companionship, he or she becomes terrified of being deprived of them. Under these conditions a person can be easily influenced and, with very little enticement, may agree to anything in order to continue receiving assistance. Alienating the vulnerable person from his or her family and friends makes him or her even more dependent.²⁰ He or she becomes unable to resist suggestions made by his or her caregiver and, in most cases, is easily manipulated.

¹⁷ E.g. *Barrett Estate v Dexter* (2000), 268 AR 101, 34 ETR (2d) 1 [*Barrett*]; *Feng v Sung Estate* (2003), 1 ETR (3d) 296, 37 REL (5th) 441 aff'd 11 ETR (3d) 169, 9 RFL (6th) 229 [*Feng*].

¹⁸ Griesdorf, *supra* note 8 at 324.

¹⁹ As stated by Griesdorf "[t]he relationship emerges from a previously non-romantic caregiving capacity". Griesdorf, *supra* note 8 at 316; Oosterhoff, "Foreword", *supra* note 8 at 1.

²⁰ Due to the alienation, the family and friends have restricted access to the vulnerable person. They are not informed about the marriage until after the wedding. The marriage ceremony is witnessed by strangers.

Dependency prevents a person from seeing the reasons for which another party desires marriage or to recognize all the consequences of their union.²¹ It is very rare that a victim spouse is aware of being exploited.²²

A caregiver is one who has the responsibility to care for a vulnerable person, particularly to attend his or her daily needs, such as preparing and serving food, cleaning, and keeping company.²³ It is essential that the predatory spouse is the vulnerable person's primary caregiver.²⁴ It allows him or her to develop a relationship in which he or she is dominant and has considerable power over the vulnerable person. The predatory spouse is usually much younger than the victim spouse; however, it is possible to imagine a predatory marriage developing between two elderly or young people wherein one of them acts as caregiver to the other.²⁵

Care and affection provide the facade for the true reason the predatory spouse pursues the marital relationship: he or she is motivated to exploit the vulnerable party for personal benefit.²⁶ The caregiver's actions aim at acquiring access to and

²¹ Whaley, *Capacity to Marry*, *supra* note 8 at 70.

²² Out of four relevant cases, in only one of them (*Feng*, *supra* note 17) was the vulnerable person aware of being exploited and informed his relatives about it; he also told them that he was threatened into giving money to his caregiver.

²³ Lindsey E Wylie & Eve M Brank, "Assuming Elder Care Responsibility: Am I a Caregiver?" (2009) 8 J Empirical Legal Stud 899 at 900-901.

²⁴ However, it is possible to imagine that another person on whom a vulnerable person depends, such as a nurse or a doctor, could become a predatory spouse.

²⁵ Oosterhoff believes that age discrepancy is a "typical" feature of a predatory marriage. See Oosterhoff, "Foreword", *supra* note 8 at 1.

²⁶ Whaley, *Capacity to Marry*, *supra* note 8 at 69.

control over the vulnerable person's property.²⁷ Marriage is merely a tactic employed to achieve the strategic goal.²⁸ Prior to marriage, the caregiver starts managing the vulnerable person's financial affairs and commences asset appropriation, including money and physical property. Testamentary dispositions are influenced as well. On the day of marriage, the well-planned and reasoned will made in favour of the vulnerable person's family or friends is revoked by operation of law.²⁹ In some cases, shortly after the marriage, the victim spouse executes a new will in favour of and under the undue influence of the new spouse.

The Scheme of Exploitation Through Marriage

Four rulings³⁰ have been made during the last decade in Canada's common law provinces that deal specifically with the problem of predatory marriages involving the elderly³¹: *Banton*

²⁷ Oosterhoff, "Barrett Estate", *supra* note 14 at 116.

²⁸ Griesdorf, *supra* note 8 at 315.

²⁹ See e.g. *Succession Law Reform Act*, *supra* note 12 s 16; *The Wills Act*, CCSM c W150 s 16 -17; *The Wills Act*, 1996, SS 1996, c W-14. 1 s 17 [*The Wills Act*]; contra *Wills and Succession Act*, *supra* note 12; *Wills, Estates and Succession Act*, *supra* note 12 s 55.

³⁰ There are other cases that identify the problem of predatory marriages, but are difficult to refer to because not all the facts are mentioned or discussed in the ruling; e.g. *Re McElroy*, [1978] 22 OR (2d) 381, 93 DLR (3d) 522 [*Re McElroy*] or because the pattern of events is different than in the considered cases e.g. *Hart v Cooper* (1994), 2 ETR (2d) 168, 45 ACWS (3d) 284; in some cases courts did not recognize the union as predatory and was displeased with the testator's child attempt to break it up, e.g. *Berger v Clark*, 2002 BCCA 316, [2002] BCWLD 1006; *Re Harding*, [1973] 6 WWR 229.

³¹ These cases are the most often referred to when the problem of marriages between an elderly person and his or her caregiver is considered. The problem is present also in other common law countries, *inter alia* Great Britain and the United States; see e.g. *In re*

v Banton,³² *Barrett Estate v Dexter*,³³ *Danchuk v Calderwood*³⁴ and *Feng v Sung Estate*.³⁵ Details differ slightly, but a pattern of events is common.

In each case, an employed female caregiver exploited a physically and/or mentally impaired male elder.³⁶ Before that took place, there was a close and warm relationship between the elder and his family.³⁷ The elder's affection for his children was confirmed by wills made in their favour and powers of attorney given to them.³⁸ However, the mental and/or physical deterioration of the elder made it necessary for him to be assisted in his daily affairs.³⁹ The hired caregiver became aware of the elder's severe health issues and his significant financial assets.⁴⁰ With time, the woman alienated the elder from his

Davey, [1981] 1 WLR 164 [*In re Davey*]; Ashley E Rathbun, "Marrying into Financial Abuse: A Solution To Protect the Elderly in California" (2010) 47 San Diego L Rev 227.

³² (1998), 164 DLR (4th) [*Banton*].

³³ *Barrett*, *supra* note 17.

³⁴ (1996), 15 ETR (2d) 193, 67 ACWS (3d) 418 [*Danchuk*].

³⁵ *Feng*, *supra* note 17.

³⁶ In all the listed cases, the woman is hired as a caregiver; however, that does not have to be the case; see e.g. *In re Davey*, *supra* note 31.

³⁷ E.g. *Banton*, *supra* note 32 at paras 11-12; *Feng*, *supra* note 17 at para 12.

³⁸ E.g. *Banton*, *supra* note 32 at para 1; *Barrett*, *supra* note 17 at para 13; *Danchuk*, *supra* note 34 at para 9.

³⁹ E.g. *Banton*, *supra* note 32 at para 11; *Barrett*, *supra* note 17 at para 8; *Danchuk*, *supra* note 34 at para 46-47.

⁴⁰ E.g. *Banton*, *supra* note 32 at para 18; *Danchuk*, *supra* note 34 at paras 51, 127; *Feng*, *supra* note 17 at para 40, 53.

family and friends, started influencing the elder's decisions,⁴¹ and began appropriating money and property beyond the compensation agreement of the employment contract.⁴² Finally, to control the elder's assets, the caregiver manipulated the elder into marriage. The secretive ceremony took place on short notice, was witnessed by strangers and, in most cases, lacked a wedding reception.⁴³ In each case, the age discrepancy between the parties, the terminal illness, and the imminent death of the elder⁴⁴ clearly indicate that the caregiver had no intention of spending years of her life with her new, much older spouse.⁴⁵ As a result, the relationship would be very short, but would potentially result in significant financial gain for the caregiver. These gains were secured under a power of attorney given to the caregiver and a new will drafted in her favour, both achieved under the caregiver's undue influence.⁴⁶

⁴¹ E.g. *Banton*, *supra* note 32 at para 29; *Barrett*, *supra* note 17 at para 44; *Danchuk*, *supra* note 34 at para 56.

⁴² E.g. *Barrett*, *supra* note 17 at paras 15, 43; *Danchuk*, *supra* note 34 at paras 58-60, 65, 125; *Feng*, *supra* note 17 at para 50.

⁴³ E.g. *Banton*, *supra* note 32 at paras 1, 83, 99; *Barrett*, *supra* note 17 at paras 21-22; *Danchuk*, *supra* note 34 at para 56; *Feng*, *supra* note 17 at para 22, 30.

⁴⁴ E.g. *Danchuk*, *supra* note 34 at paras 2, 62; *Feng*, *supra* note 17 at paras 1, 47.

⁴⁵ E.g. *Banton*, *supra* note 32 at para 1; *Barrett*, *supra* note 17 at paras 7, 10; *Danchuk*, *supra* note 34 at paras 2, 6. However, a relationship between an older man and a younger woman does not need to create dependency; see e.g. *Hamilton Estate v Jacinto*, 2011 BCSC 52.

⁴⁶ E.g. *Banton*, *supra* note 32 at para 1; *Barrett*, *supra* note 17 at paras 15, 28, 87; *Feng*, *supra* note 17 at paras 39, 40. Testamentary undue influence may occur regardless of marriage; see e.g. *Re Marsh Estate* (1991), 41 ETR 225, (1990) 99 NSR (2d) 221 [*Re Marsh Estate*].

In practice, the relationship resembled a business arrangement with remuneration that substantially exceeded those established under the employment contract.⁴⁷ The caregiver would provide companionship and care for the elder until his death and, in exchange, would gain access to the elder's assets, receive undue amounts of money during his life and inherit most of his assets after his death. However, the elder seemed unaware of all the consequences of marriage and, in most cases, strongly believed in the sincerity of the woman's affection.⁴⁸ He seemed unsuspecting that his caregiver and future wife was executing a plan of financial exploitation, using marriage to gain legal rights to his assets and, eventually, to his estate.

In most of the listed cases the court found the marriage invalid and stopped the predatory spouse from inheriting the victim spouse's estate. In *Barrett Estate v Dexter*⁴⁹, the marriage was null, because of the victim spouse's lack of capacity to understand the nature, obligations, and responsibilities of the marriage.⁵⁰ His will, made for the benefit of his caregiver, was not considered as juristically operative.⁵¹ In *Danchuk v Calderwood*, the marriage was declared void because the victim spouse was separated, but not divorced from his prior spouse; his will made in favour of his caregiver was found invalid, because it was executed under undue influence

⁴⁷ It is not unusual for an elder to benefit his or her caregivers under his or her will; however, in those cases, the testator makes a conscious decision to give his or her estate in exchange for daily care and assistance; see e.g. *Boghici Estate v Benke*, [2005] 13 ETR (3d) 295, 136 ACWS (3d) 780.

⁴⁸ Feng seems to be an exception (*Feng*, *supra* note 17). He was aware that the woman married him for his money.

⁴⁹ *Barrett*, *supra* note 17.

⁵⁰ *Ibid* para 89.

⁵¹ *Ibid* para 28.

and was made under suspicious circumstances.⁵² In *Feng v Sung Estate*, the court concluded that the marriage was null and void, because the victim spouse lacked the mental capacity to refuse her proposal and did not comprehend the consequences of their marriage.⁵³ His estate was divided according to his will made prior to the marriage.⁵⁴

In *Banton v Banton*⁵⁵ the court found the marriage valid, but gave an impression that Canadian law failed to provide a just outcome. The court recognized that it was a “case of a lonely, depressed, terminally ill, severely disabled and cognitively impaired old man whose enfeebled condition made him an easy prey for a person like [Yassin – his caregiver] with designs on his property.”⁵⁶ Unlike in other cases, in *Banton v Banton*, the court did not have sufficient tools to prevent the elder’s spouse from inheriting after him.

Predatory marriage cases expose areas existing in the currently binding law that can be used by financially motivated caregivers to exploit elderly persons. The outcome of *Banton v Banton*⁵⁷ urges seeking alternative solutions that would modify the law to protect the well-being of the elderly and their families. The case details are as follows.

⁵² *Danchuk*, *supra* note 34 para 129-130.

⁵³ *Feng*, *supra* note 17 para 61.

⁵⁴ *Ibid* at para 66.

⁵⁵ *Banton*, *supra* note 32.

⁵⁶ *Ibid* at para 98.

⁵⁷ *Ibid*.

Banton v Banton⁵⁸

George Banton (hereinafter “Banton”) was married twice and had a very close and loving relationship with his five children. They assisted him in daily affairs, visited him frequently, and enjoyed the broad aspects of family life. Under the will he executed in 1991, Banton divided his estate equally among his children.⁵⁹ He gave two of his children a continuing power of attorney in regard to all his property. In 1994 he transferred some of his money into a bank account held jointly with his sons.

Banton was severely deaf and had difficulty walking. At the beginning of the 1990’s, he was diagnosed with prostate cancer and subsequently castrated. After his second operation in 1992, his family was informed that he would live two to three years more. In spite of his children’s offers to move him to one of their homes, he decided to move to a retirement home in 1993. Soon afterwards, in 1994, he became depressed and lonely, his memory deteriorated, and he experienced trauma, which drastically changed his personality. He became reckless and started sharing information about his assets with strangers; he became detached from reality and delusional about his children. About the same time, at age 88 years, he began developing a close relationship with 31-year-old Muna Yassin (hereinafter “Yassin”), a waitress in the restaurant at the retirement home. Under her influence, he became enthusiastic about his mental, physical, and financial capabilities. He hired her in July 1994 as his companion and assistant. Notably, on a few occasions he tried unsuccessfully to end their business and personal relationship.

⁵⁸ *Ibid.*

⁵⁹ He also provided a certain amount of money for the care and maintenance of his second wife, but she predeceased him.

Banton's children were concerned about his association with Yassin, and had his mental capacity assessed. On November 14, 1994, he was certified as financially incompetent.⁶⁰ After being informed of this fact, he, in the company of Yassin, attempted to withdraw large sums of money from the joint account. His sons exercised their power of attorney on December 15, 1994, and transferred all of Banton's money to a trust for income and capital of which Banton was the sole beneficiary. His children were designated as the beneficiaries after his death.

Banton and Yassin were married on December 17, 1994, with two strangers as their witnesses. Banton's children were unaware of the marriage. Four days later, on December 21, 1994, Banton executed a new will and power of attorney, both in favour of Yassin.⁶¹ In April 1995, Banton moved to Yassin's apartment. His family had virtually no access to him until he was hospitalised in October 1995. Subsequently, he was moved to a retirement home and Yassin was asked not to visit because her visits "upset and agitated" him.⁶² He died on February 14, 1996.

The marriage was found valid, because the court found Banton capable of appreciating the nature, obligations and responsibilities of the marriage relationship. However, the court decided that Banton did not have testamentary capacity at the time of making his will, that Yassin unduly influenced the

⁶⁰ Later, Banton's capacity was reassessed. First, on May 17, 1995, when Banton was found capable of managing his property and delegating power of attorney and again, on June 19, 1995, when he was certified as not having the capacity to manage his property, but as capable of delegating power of attorney and personal care.

⁶¹ The will and the power of attorney were re-executed on May 4, 1995.

⁶² Before his death Banton admitted to one of his children that he made "a mess of things."

making of the will and that he was under the delusion that his children cared only about his money. Consequently, his estate passed on intestacy. The trust created by Banton's sons was found invalid and the money, with the exception of that obtained from the sale of his house, became part of the estate.

PREDATORY MARRIAGE AS AN ISSUE

Predatory Marriage as a Social Issue

Society is obliged to protect its elderly from exploitation and abuse. Predatory marriages constitute the abuse of a trust-based relationship, in which the vulnerable person is exploited when the caregiver is interested in his or her charge's money rather than in his or her well-being. Further, allowing predatory marriages could increase the prejudice against marriages between elders and much younger persons. These marriages are already treated with suspicion, as the motive for the union is usually questioned.⁶³ It is suspected that the younger spouse is solely interested in gaining access to the elder spouse's assets.⁶⁴ It could be argued that the financial exploitation present in predatory marriages is a basis for disallowing a marriage with a large age difference. Further, turning a blind eye to predatory marriages could be considered a silent agreement given by society to caregivers to exploit their position for personal benefits and escalate the problem of predatory marriages. Predatory marriages show that there is a gap in the system of protection of private rights through which a caregiver can affect his charge's rights, in particular, the right to freedom of testation and the right to family life.

The victim spouse is denied the right to dispose his or her property according to his or her wish. Marriage, into which

⁶³ Rathbun, *supra* note 31 at 233.

⁶⁴ *Ibid* at 233-235.

the victim spouse is manipulated, automatically revokes all previous testamentary dispositions regardless of the victim spouse's intent. If a new will is made under testamentary undue influence of the predatory spouse, the victim spouse is denied the right to express his or her testamentary intent and the will represents the wishes of the predatory spouse rather than of the testator. Further, if a person does not have testamentary capacity at the time he or she enters a marriage, he or she cannot decide the future division of his or her estate.

Further, the victim spouse's rights to enjoy his or her family are compromised. The predatory spouse alienates the victim spouse from his or her friends and family, and influences him or her, so they become delusional about his or her loved ones. As a result, he or she dies angry, unsatisfied, and disappointed in his or her family.

Theoretically, predatory marriage could be justified as a contract under which the parties agree to exchange care and companionship provided by the predatory spouse in exchange for the victim spouse's rights to his or her assets; however, a caregiver is usually compensated under an employment contract or an equivalent service contract.⁶⁵ Using marriage for this purpose seems inappropriate, especially in Western society, wherein marriage is traditionally conceived of as a relationship between two people who wish to publicly manifest the love and commitment they share with each other.⁶⁶ Marriage provides spouses with property rights to create a partnership based on respect and equality. In cases of predatory marriage, affection is supplanted by its illusion and the

⁶⁵ See *Banton*, *supra* note 32; *Barrett*, *supra* note 17; *Danchuk*, *supra* note 34; *Feng*, *supra* note 17. In all these cases, the woman is hired as a caregiver.

⁶⁶ *Halpern v Toronto (City)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529 at para 5.

marriage is based on dependency, coercion, and a desire for financial benefit.⁶⁷

Finally, members of society, namely the elder's family and friends, suffer because of predatory marriage. They suffer emotional damage as a result of being deprived of an on-going healthy and supportive relationship with the elder. They are also deprived of any financial benefits they would have received under the will made prior to the predatory marriage. If a will in favour of the predatory spouse is executed, friends and family members are usually disinherited entirely.⁶⁸

While only a few cases have been aired in court, there is a significant probability that most predatory marriages are not identified.⁶⁹ Considerable costs prevent litigation in a majority of estate cases, while in many others there is no one interested in questioning the marriage or the will's validity.⁷⁰ As lifespans increase in the elderly population, statistically, the predatory marriage problem will also increase.⁷¹ Steps to prevent predatory marriages must be taken.

Predatory Marriage as a Legal Issue

Neither legislators nor courts have comprehensibly addressed the issue of predatory marriages in Canadian common law provinces. Under Canadian law, there is no specific legislation

⁶⁷ Griesdorf, *supra* note 8 at 315.

⁶⁸ *Ibid.*

⁶⁹ Rathbun, *supra* note 31 at 230 (footnote 18); Oosterhoff, "Predatory Marriages", *supra* note 9 at 38.

⁷⁰ Oosterhoff, "Barrett Estate", *supra* note 14 at 116.

⁷¹ Whaley, *Capacity to Marry*, *supra* note 8 at 5-6 (footnote 115).

regulating the problem of predatory marriages.⁷² Further, although a pattern characterizes such unions, there is no uniform approach to remedy predatory marriages in Canada's common law provinces. None of the courts acknowledged that the relevant cases bear significant similarities and tried to address the problem by providing a solution that could be applied to other cases rather than persist with a case-by-case approach.⁷³ In each ruling, the courts considered similar issues: the validity of the predatory marriage, the predatory spouse's motivation, and, if necessary, testamentary undue influence exercised on the victim spouse, as well as the victim spouse's testamentary capacity.⁷⁴ Furthermore, particular judges referred to earlier rulings involving predatory marriages and drew upon their verdicts, indicating clear awareness of those precedents.⁷⁵

SOLUTIONS

Solutions Proposed by Canadian Scholars

Predatory marriages have been discussed and analysed by scholars, who suggest ways to prevent these marriages from taking place or ways to better protect the presumed interests of vulnerable persons and their heirs. Their proposals are grounded in Canadian law; they require amending currently binding law, appealing to existing legal institutions, or imposing new procedures. The proposed suggestions are analysed in the context of their aims as well as from a more general perspective.

⁷² Predatory marriages are regulated only under the general acts relating to succession and family law.

⁷³ E.g. *Banton*, *supra* note 32.

⁷⁴ E.g. *Ibid* at paras 2ff.

⁷⁵ E.g. *Feng*, *supra* note 17 at para 55-59.

Difficulty in Nullifying Predatory Marriages

It is difficult to challenge the validity of a predatory marriage. If it is entered into under duress, it is not void, but voidable.⁷⁶ Only the spouses can set it aside, and they can do so only while they are both alive.⁷⁷ However, questioning the validity of the marriage is not in a predatory spouse's interest. Invalidating marriage would deprive him or her of the property rights gained through the union. An executor of an estate of a deceased spouse may contest voidable marriage only if the deceased commenced the proceedings prior to his or her death.⁷⁸ However, an old and ill person is unlikely to start that kind of proceeding.⁷⁹ For that reason, predatory marriages are in most cases challenged after the death of the vulnerable person on the basis of the deceased's lack of capacity to marry.⁸⁰

Oosterhoff suggests changing the law regarding the validity of marriages by widening the range of persons entitled to contest the validity of a marriage on the basis of coercion, fraud or undue influence after the death of one of the spouses.⁸¹ Presumably, it should include the executor of the estate of the deceased or "any person with a financial interest in the

⁷⁶ *Brosseau v Belland*, [1932] 2 WWR 632 at 4 [*Brosseau*]; Oosterhoff, "Consequences", *supra* note 14 at 273-274.

⁷⁷ *Cavell v Prince* (1865-66), LR 1 Ex 246.

⁷⁸ Griesdorf, *supra* note 8 at 324.

⁷⁹ *Ibid*; *contra* see e.g. *Juzumas*, *supra* note 15.

⁸⁰ E.g. *Banton*, *supra* note 32; *Feng*, *supra* note 17.

⁸¹ Oosterhoff, "Barrett Estate", *supra* note 14 at 119, 123; Albert H Oosterhoff, *Oosterhoff on Wills and Succession. Text, Commentary and Materials*, 7th ed (Toronto: Carswell 2011) at 324 [Oosterhoff, *Oosterhoff*]; Oosterhoff, "Predatory Marriages", *supra* note 9 at 60.

matter.”⁸² Griesdorf advocates applying this solution to persons with weakened capacity as well, in order to protect those more easily affected by others.⁸³

The proposed suggestion could be helpful in the case of predatory marriages; however, it is more beneficial to society if nullifying a marriage stays restricted. If implemented unconditionally, it could become too easy to nullify a marriage after a spouse’s death and would deprive a surviving spouse of his or her rights. Further, there could be cases in which a marriage would be nullified years after it was entered into. In such situations, even if a person had been coerced into marriage, he or she would be likely to grow to accept the marriage over the years. If a spouse had not contested the marriage’s validity during his or her lifetime, it is possible that he or she would not wish for it to be done posthumously. A third person should not be allowed to question the marriage after a spouse’s death.

Low Entry Threshold for Capacity to Marry

Although a spouse’s lack of capacity to marry renders a marriage void, it is very difficult to prove.⁸⁴ The law regulating the capacity to marry is not sufficiently transparent: the capacity to marry is not legislatively regulated, and there is no single, comprehensive definition of marriage or of the capacity to marry.⁸⁵ In case law, marriage is described as “a very

⁸² *Ibid.*

⁸³ Griesdorf believes that the ruling in the case *Feng* makes an important breakthrough. “Greer J. made the connection between capacity, influence and consent: where there is weakened capacity, it takes less influence to overthrow someone’s independent consent.” Griesdorf, *supra* note 8 at 324-325.

⁸⁴ Brosseau, *supra* note 76 at 4.

⁸⁵ Whaley, *Capacity to Marry*, *supra* note 8 at 2.

simple” contract to enter for which a high degree of intelligence is not required.⁸⁶ To be married, a person must be capable only of comprehending the nature of marriage and its obligations.⁸⁷ No party needs to understand all the responsibilities that come with marriage.⁸⁸

The requirement of minimum comprehension of the nature of marriage is historically justified by the urge to promote and make marriage more accessible.⁸⁹ The discrepancy between a low threshold for capacity to marry and the high protection of a spouse's property rights is a result of stagnation in the case law and the progress of legislation.⁹⁰ As Whaley recognizes, the policy and law ought to be reconsidered in the face of an aging population, an increase in the number of people marrying more than once during their lifetime, and a rise in the number of people suffering from mental impairments.⁹¹

According to some scholars, the capacity to marry should be made stricter and “include the ability to appreciate the basic consequences of entering into the contract of marriage.”⁹² Oosterhoff and Whaley advocate redefining the capacity to marry in such a way as to include a consideration of

⁸⁶ Oosterhoff, “Consequences”, *supra* note 14 at 271.

⁸⁷ *Re McElroy*, *supra* note 30 at para 6.

⁸⁸ Kimberly Whaley, “Predatory Marriages: Legal Capacity to Marry and the Estate Plan”, *The Six-Minute Estates Lawyer 2011* (14 December 2011), online: Whaley Estate Litigation <<http://whaleyestatelitigation.com>> at 10.

⁸⁹ Whaley, *Capacity to Marry*, *supra* note 8 at 2.

⁹⁰ *Ibid* at 2-3.

⁹¹ *Ibid* at 3.

⁹² Jordan M Atin, “Revocation of Wills by Marriage” (1998-1999) 18 ETPJ 13 at 26.

the financial consequences of marriage.⁹³ Vulnerable persons should be also advised that “a capacity assessment specifically on the issue of capacity to marry” would include testing their understanding of the consequences the marriage would have on the rights of their children.⁹⁴

Marriage and, especially, capacity to marry should be regulated in a more transparent way. As was suggested, implementing a test that would establish a person’s capacity to marry could clarify some situations. However, unless a law requiring a spouse to know or understand all the consequences of marriage would be implemented, the test would exclude only the most extreme cases, and it would not solve the issue of predatory marriages. Nevertheless, implementing more restrictive law would limit the number of people allowed to marry.

Spouse’s Extensive Property Rights

In spite of the low entry threshold for capacity to marry, marriage has significant consequences for a person’s property. It provides an individual with rights to his or her spouse’s property under family and succession law.⁹⁵ To prevent the vulnerable person from being taken advantage of and from the effect that marriage has on spousal property rights, Oosterhoff

⁹³ Oosterhoff, “Consequences”, *supra* note 14 at 272-273; Oosterhoff, “Barrett Estate”, *supra* note 14 at 121; Oosterhoff, “Predatory Marriages”, *supra* note 9 at 39-42, 59-60; Whaley, *Capacity to Marry*, *supra* note 8 at 3-4.

⁹⁴ Oosterhoff, “Barrett Estate”, *supra* note 14 at 119-120; Rathbun also proposed a “Marital Capacity Test”; see Rathbun, *supra* note 31 at 261ff.

⁹⁵ See footnotes 12-14.

recommends limiting property rights gained through marriage.⁹⁶

In the context of predatory marriages, depriving a predatory spouse of the right to inherit most of his or her spouse's estate on intestacy could make predatory marriages less attractive. However, limiting a surviving spouse's rights to the deceased's estate would influence also non-predatory spouses, who, in absence of statutory rights to the deceased's estate, could be left without adequate support.

High Testamentary Capacity

Capacity to marry is also problematic in the context of the more highly restricted testamentary capacity. As a result, a person may be capable of marrying or remarrying, but not of making a new will. Marriage revokes all prior wills irrespective of the testator's current testamentary capacity.⁹⁷ Consequently, even the will of a testator who does not possess testamentary capacity and whose intentions at the time of entering marriage are unclear is revoked by operation of law by his or her subsequent marriage.⁹⁸ Thus, if after being married, a person is unable to make a new will, the estate passes on intestacy.⁹⁹

Oosterhoff addresses the problem of the discrepancy between the threshold of capacity to marry and testamentary

⁹⁶ Oosterhoff, "Consequences", *supra* note 14 at 272-273; Oosterhoff, "Barrett Estate", *supra* note 14 at 121.

⁹⁷ See e.g. *Succession Law Reform Act*, *supra* note 12 s 15, *The Wills Act*, *supra* note 29 s 17. It is not a problem in provinces in which marriage does not revoke a will, see e.g. *Wills and Succession Act*, *supra* note 12.

⁹⁸ Oosterhoff, "Consequences", *supra* note 14 at 273; Oosterhoff, "Barrett Estate", *supra* note 14 at 121.

⁹⁹ *Ibid.*

capacity by proposing to make the capacity to marry match or even depend on testamentary capacity.¹⁰⁰ Namely, unless a person has a capacity to make a will, he or she cannot enter a marriage.

Implementing Oosterhoff's suggestion would make access to marriage more restricted and, most likely, most predatory cases would be stopped from taking place, particularly if the mental state of spouses-to-be were assessed. However, from a societal perspective, imposing additional restrictions could prevent, for example, mentally impaired people from legalizing their relationships.¹⁰¹ It could also lead to increased litigation in which a marriage's validity is questioned. More importantly, it is the misuse of marriage, not marriage itself, which leads to the situation of predatory marriages. Marriage is one of the most basic unions in society and should be readily accessible. It should not be modified unless it is absolutely necessary to do so.

Further, these solutions raise the concern of assessing testamentary capacity at the time of marriage. As argued by Atin, deciding whether or not a person possesses testamentary capacity at the time of making a will is difficult to resolve, even when the will is made with the help of a practising, experienced lawyer.¹⁰² The evaluation is even more difficult when this witness is not available; currently the presence of a

¹⁰⁰ Oosterhoff, "Consequences", *supra* note 14 at 273; Oosterhoff, "Barrett Estate", *supra* note 14 at 121; Oosterhoff, *Oosterhoff*, *supra* note 81 at 325-326; Albert H Oosterhoff, "Testamentary Capacity, Suspicious Circumstances and Undue Influence" (1998-1999) 18 ETPJ 369 at 375 [Oosterhoff, "Testamentary Capacity"]. Oosterhoff withdrew from supporting this solution in his article "Predatory Marriages", *supra* note 9 at 59.

¹⁰¹ *Contra* Oosterhoff, "Consequences", *supra* note 14 at 273.

¹⁰² Atin, *supra* note 92 at 25-26.

lawyer is not required for a marriage ceremony to be valid.¹⁰³ Proving testamentary capacity or its lack thereof at the time of marriage also causes practical problems of burden of proof and administrative difficulties.¹⁰⁴

Griesdorf proposes that persons who preside over marriages should be educated about capacity to marry and obliged to follow standards similar to lawyers when they prepare wills for their clients: observe and record the entire ceremony and the parties' behaviour and be able to "attest to the parties' capacity and independent consent."¹⁰⁵ In ambiguous situations, the notes may need to be scrupulously detailed.¹⁰⁶ However, the persons presiding over marriages spend very little time with the persons who enter marriage and, except in extreme cases, without specialized training may not be able to recognize that one of the parties of the future marriage may lack the capacity to marry.¹⁰⁷

Moreover, persons above a certain age who are entering marriage could be required to have their testamentary capacity and their capacity to manage property evaluated. However, such a procedure might raise the question of equality. For that reason, instead of professional assessment, persons presiding over marriages could be required to ask the same type of questions that lawyers ask when preparing a will. Specialized training could make them more sensitive to any ambiguous situations.

¹⁰³ *Ibid* at 25.

¹⁰⁴ See generally *Ibid*.

¹⁰⁵ Griesdorf, *supra* note 8 at 327.

¹⁰⁶ *Ibid*.

¹⁰⁷ Whaley, *Capacity to Marry*, *supra* note 8 at 89; see also Oosterhoff, "Predatory Marriages", *supra* note 9 at 39-40.

Revocation of a Will by Marriage

Another approach suggests changing the law on revocation of a will by marriage.¹⁰⁸ According to Oosterhoff, the revocation of a will by marriage “is based on the assumption that the testator wants to have a prior will revoked so that the new spouse will be provided for on the testator’s intestacy;” therefore Oosterhoff argues that marriage of a person lacking testamentary capacity, should not result in revocation of the will he or she made prior to the marriage.¹⁰⁹ Griesdorf goes a step further. She suggests that revocation of a will by marriage is redundant under the protection offered to a spouse under the succession and family law legislation.¹¹⁰ Further, she also points out that automatic revocation of a will is dangerous, because the general public is unaware of it and its outcome may be unfair for children from prior marriages.¹¹¹ She advocates abandoning it.

¹⁰⁸ This does not apply in provinces where marriage does not revoke a previously existing will, see e.g. *Wills and Succession Act*, *supra* note 12.

¹⁰⁹ Oosterhoff, “Barrett Estate”, *supra* note 14 at 121; Oosterhoff in his more recent article suggests that revocation of a will by marriage should be totally abandoned, see Oosterhoff, “Predatory Marriages”, *supra* note 9 at 58.

¹¹⁰ Griesdorf, *supra* note 8 at 326; Oosterhoff, “Barrett Estate”, *supra* note 14 at 120; Oosterhoff, “Predatory Marriages”, *supra* note 9 at 48-50.

¹¹¹ Griesdorf, *supra* note 8 at 326; see Law Reform Commission of Saskatchewan, *Report on Revocation of Wills* (May 2006), online: The Law Reform Commission of Saskatchewan <<http://www.lawreformcommission.sk.ca/>>, Law Reform Commission of Nova Scotia, *Reform of the Nova Scotia Wills Act*, Final Report, (Halifax: Law Reform Commission of Nova Scotia, 2003) at 28-30.

Atin questions the alleged protection that the legislation provides for a surviving spouse.¹¹² If a spouse does not inherit under the rules of intestacy, his or her rights are limited. He or she cannot apply for an equalizing payment from the deceased's estate, for example under the *Family Law Act*, if there was no "increase in value of the deceased's property from the date of marriage to the date of death."¹¹³ The same may happen if the deceased's property declined in value or the surviving spouse's property increased in value.¹¹⁴ However, the spouse may receive assets under the dependant's relief legislation (for example, in Ontario, if the spouse was a dependant of the deceased, he or she may still apply for support under section 58 of the *Succession Law Reform Act*).¹¹⁵

Further, Atin argues that the end result may still be unjust.¹¹⁶ Revocation of a will by marriage may be unfair to those who were appointed as beneficiaries under the revoked will, but keeping the will in force, in spite of the marriage, could be hurtful to the spouse of the deceased.¹¹⁷ By revoking a will made prior to marriage, the law follows the most rational wish of the deceased to dispose his or her property in favour of his or her family and their spouses and children. It also protects

¹¹² Atin, *supra* note 92 at 25.

¹¹³ *Ibid*; equalizing claims can be made also in Manitoba, Northwest Territories and Prince Edward Island; see *Family Law Act*, SNWT 1997, c 18 s 35ff; *Family Property Act*, *supra* note 14 s 25ff; *Family Law Act*, RSPEI 1988, c F-2.1 s 6.

¹¹⁴ Atin, *supra* note 92 at 25.

¹¹⁵ *Succession Law Reform Act*, *supra* note 12 s 58; a surviving spouse or (when applicable) partner can apply for support out of the estate also in other provinces, see footnotes 12-13.

¹¹⁶ Atin, *supra* note 92 at 24.

¹¹⁷ *Ibid*.

the deceased's family members by providing them with the right to the deceased's estate on intestacy.¹¹⁸

Abandoning revocation of a will by marriage would allow a vulnerable person's children to inherit under his or her will made prior to the marriage, regardless of the marriage. If the revocation was abandoned, the will could be revoked only by a testator and only if he possessed testamentary capacity at the time of the revocation. It is worth nothing that revocation is but one of several regulations that provide the family of a deceased person with access to his or her estate. Unlike in civil law jurisdictions, there are no compulsory shares, so a testator may disinherit an heir. In some provinces (e.g. Ontario), if there is a will, apart from testamentary heirs only a deceased's dependant can receive support from the estate. For that reason, the doctrine of revocation of a will by marriage should remain in force; however, limiting its scope of application could be considered by providing an exception under which a marriage would not revoke an existing will if at the time of the wedding the person who married lacked testamentary capacity or was under duress. Means of assessing a person's legal and testamentary capacity on the day of marriage ceremony should be considered.

Effects of Marriage on Wills

Griesdorf believes that since marriage generally revokes prior wills, it should be subject to challenge as with any other testamentary act.¹¹⁹ The same rules for the burdens and presumptions should apply to challenging wills and marriages, especially if circumstances appear suspicious.¹²⁰ As in cases of a will, the court should not affirm a marriage's validity unless

¹¹⁸ *Ibid* at 24-25.

¹¹⁹ Griesdorf, *supra* note 8 at 324.

¹²⁰ *Ibid* at 327.

the suspicious circumstances are discarded.¹²¹ If events raise specific and founded suspicions that a party entered a marriage without having the capacity to marry or did so under duress, the court ought to increase its scrutiny and pursue the problem to make sure that, nevertheless, the marriage is valid.¹²²

Griesdorf lists a combination of features that may raise the supposition of suspicious circumstances. Those are: a significant age difference between the spouses, mental or physical disability of one of the spouses, imminent death of one of the spouses, or major financial gain through the marriage of one of the spouses.¹²³ According to Griesdorf, if those factors are present, the marriage, the facts related to entering it, and the parties' consent to it should be examined with as much scrutiny as are wills, their formation and the testator's capacity to execute them.¹²⁴

Increasing scrutiny in reviewing the marriage's validity entered by parties in suspicious circumstances is likely to increase the number of identified predatory marriages. However, the proposal, unless implemented together with additional grounds for finding a marriage void, does not advance the law on predatory marriages. The change does not affect the conditions under which a marriage is found void or the order of succession on intestacy.

¹²¹ See Oosterhoff, *Oosterhoff*, *supra* note 81 at 215.

¹²² Griesdorf, *supra* note 8 at 327.

¹²³ *Ibid.*

¹²⁴ For more risk factors see C Peisah et al, "The Wills of Older People: Risk Factors for Undue Influence" in The Law Society of Upper Canada, *Special Lectures 2011: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Canada: Irwin Law, 2011) 211 at 217-227.

Analysis of the Proposed Solutions

Each of the previous proposals exposes the difficulty of addressing the problem of predatory marriages. Applying each of the proposals could certainly decrease the number of predatory marriages, diminish their attractiveness for potential predatory spouses or even completely eliminate the problem. Further, the suggestions drawn from Canadian law and legal doctrine are consistent with the specifics of the Canadian legal system.

As helpful as these proposed solutions could be in remedying the predatory marriage issue, they could also adversely influence the accessibility, permanence, and consequences of marriage. They involve restricting access to marriage; they facilitate nullification of marriage on extended grounds; they increase the number of conditions under which persons may enter marriage; or they limit the rights granted to the spouses. However, it is difficult to direct and limit the results of the potential changes only to predatory spouses. Modifying marriage could affect many people and could have unpredictable consequences.

The suggestions that do not influence marriage itself involve assessing testamentary capacity. The number of cases in which this problem has been deliberated indicates that even experienced, practising lawyers have difficulty in making this assessment.¹²⁵ Professional training may be helpful, but it may also be insufficient. The competency of a person officiating at marriages would have to be verified.

¹²⁵ See M Elena Hoffstein & Joanna Gorman, “Capacity Assessments by the Drafting Lawyer” in The Law Society of Upper Canada, *Special Lectures 2011: A Medical-Legal Approach to Estate Planning and Decision Making for Older Clients* (Canada: Irwin Law, 2011) 309.

Comparative Solutions

A predatory spouse transgresses his or her position in a trust-dependency relationship and takes advantage of the victim spouse's mental and physical impairments for monetary gain. Depriving the predatory spouse of the benefits he or she may receive could decrease the attractiveness of predatory marriages. That could be accomplished by declaring a predatory spouse unworthy to inherit. The following section will discuss two possible solutions to this problem.

The first proposed solution draws on American law, under which the rule that a murderer should not inherit from a person he or she killed (the slayer rule) was extended to the situation of elder abuse. One form of abuse recognized under Californian law is financial abuse and, as discussed subsequently, this form of abuse could be identified in predatory marriage cases and could provide the grounds for finding a predatory spouse unworthy to inherit. The slayer rule is also recognized under Canadian common law; however, its applicability has not been extended to cases of elder abuse. It is proposed that Californian law on elder abuse could be implemented in Canada to prevent and fight predatory marriage.

The second proposed solution refers to the common law concept of testamentary undue influence. As discussed below, under current Canadian common law the fact that a testator was unduly influenced invalidates a testamentary disposition, but the person unduly influencing the testator does not suffer any consequences and can inherit after the testator on intestacy. Comparatively, under German law a will made under unlawful influence of another person is voidable, and the person unlawfully influencing the testator is found unworthy to inherit from the testator and does not receive anything from the estate. It is proposed that, as in the German model, a person

who unlawfully influences a testator's will should not be entitled to any part of the estate also on intestacy.

First Solution

The Slayer Rule

At common law, under the general rule, a person should not benefit from his or her crime.¹²⁶ In particular, a slayer cannot profit from a lethal deed he or she has committed. For that reason, a court finds him or her unworthy to inherit from his or her victim.¹²⁷ The rule is grounded in public policy and in the presumption that a victim would not want his or her killer to benefit on his or her death.¹²⁸

Under the rule, regardless of their motives, murderers cannot acquire property through their act.¹²⁹ They become

¹²⁶ In 1892, in *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147 [*Cleaver*], the court decided that any person's rights that directly resulted from that person's crime were unenforceable. Subsequently, other courts found asserting the rights of criminals who committed murder and manslaughter repugnant. See also Leonard E Lang, "Disinheriting a Murderer of an Ancestor" (1953-1954) 8 Wyoming Law Journal 132 at 132.

¹²⁷ Julie J Olenn, "Til Death Do Us Part: New York's Slayer Rule and *In re Estates of Covert*" (2001) 49 Buff L Rev 1341 at 1341.

¹²⁸ *Lundy v Lundy* (1895), 24 SCR 650 at 14 [*Lundy*].

¹²⁹ John W Wade, "Acquisition of Property by Wilfully Killing Another – A Statutory Solution" (1935-1936) 49 Harv L Rev 715 at 720. The rule does not apply if a victim, after being lethally wounded, makes a new will benefiting the slayer or lives for time sufficient to revoke his or her will or disinherit the slayer. See *Lundy*, *supra* note 128 at para 6; Andrew Simester, "Unworthy but Forgiving Heirs" (1990-1991) 10 E & TJ 217 at 212-213. Accepting a victim's intent to benefit his or her slayer as decisive prevents the rule's application if a victim forgives the slayer. C.f. J S McLennan, "Unworthy to Inherit, the

unworthy to inherit. In particular, slayers cannot inherit a share in their victim's estate provided to them under a will or on intestacy.¹³⁰ The slayers are also deprived of proceeds from the victim's life insurance,¹³¹ social security benefits,¹³² and an interest as a surviving joint tenant.¹³³ They cannot administer the victim's estate¹³⁴ or probate his or her will.¹³⁵

Californian Elder Abuse Law

The application of the consequences of the slayer rule (the unworthiness to inherit) has already been extended in some American states, where under certain circumstances and to a certain extent a person found guilty of elder abuse is found unworthy to inherit (hereinafter referred to as elder abuse law).¹³⁶ Unlike under the slayer rule, the abuser does not have to kill the elder, but it is sufficient if he or she has physically, emotionally or financially abused an elder. The abuser, like the

'Bloedige Hand' Rule and Euthanasia: What to Say in Your Will" (1996) 113 SALJ 143 at 143ff.

¹³⁰ *Lundy*, *supra* note 128 at para 4, 7; *Re Medaini*, [1927] 4 DLR 1137 at para 1; *In re Sigsworth, Bedford v Bedford*, [1935] 1 Ch 89 at paras 90-92; see J Chadwick, "A Testator's Bounty to His Slayer" (1914) 30 Law Q Rev 211 at 212.

¹³¹ See *Cleaver*, *supra* note 126; *Trudeau v Standard Life Insurance Company* (1900), 31 SCR 376.

¹³² See *Re Gore*, [1972] 1 OR 550, 23 DLR (3d) 534.

¹³³ *Ibid*; *Schobelt v Barber* (1966), [1967] 1 OR 349, 60 DLR (2d) 519.

¹³⁴ *In Re Noble Estate*, [1927] 1 WWR 938 at para 20.

¹³⁵ *In the Estate of Hall*, [1914] P 1.

¹³⁶ E.g. California, Oregon, Illinois, Maryland, see especially Lisa C Dumond, "The Undeserving Heir: Domestic Elder Abuser's Right to Inherit" (2009-2010) 23 Quinnipiac Prob LJ 214 at 229-234; Anne-Marie Rhodes, "Consequences of Heirs' Misconduct: Moving from Rules to Discretion" (2007) 33 Ohio NUL Rev 975 at 986-987.

killer, cannot inherit from his or her victim under a will or on intestacy.¹³⁷ Extending the applicability of the slayer rule thusly, aims at preventing elder abuse while punishing elder abusers.¹³⁸

California, a leader in anti-elder abuse legislation, introduced this provision in 1998.¹³⁹ Subsequently, some other states adopted this solution under their legislation or through common law.¹⁴⁰ The provided solutions vary in details; and, for that reason, only the precedential statutory solution adopted in California is discussed.¹⁴¹

Under section 259 of the Californian Probate Code a court can declare a person unworthy to inherit if all of the following circumstances are met:

- (1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or financial abuse of

¹³⁷ Seymour Moskowitz, “Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect” (2002-2003) 36 Loy LA L Rev 589 at 654.

¹³⁸ See Dumond, *supra* note 136. Also child abusers and spouse abusers are deemed unworthy to inherit under some states’ statutes, see Rhodes, *supra* note 136 at 986; Kymberleigh N Korpus, “Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation”, Note, (2000-2001) 52 Hastings LJ 537 at 568.

¹³⁹ Dumond, *supra* note 136 at 229-233.

¹⁴⁰ E.g. California, Oregon and Illinois implemented statutes, while Maryland provided it under the common law; see especially Dumond, *supra* note 136 at 229-233.

¹⁴¹ See e.g. Illinois Compiled Statutes Annotated § 5.2-6.2; Oregon Revised Statutes § 112.465.

the decedent, who was an elder or dependent adult.

- (2) The person is found to have acted in bad faith.
- (3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.
- (4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.¹⁴²

The law applies if an elderly or a dependant adult was the victim of the abuse. An “elder” is identified under the law as an individual 65 years or older.¹⁴³ A dependant adult is a person between the ages of 18 and 64 “who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights” or “is admitted as an inpatient to a 24-hour health facility.”¹⁴⁴

Abuses vary from physical or sexual, through neglect or abandonment, to causing emotional or psychological damage. Financial and material exploitation are also distinguished.¹⁴⁵ Each type of abuse listed in the section is

¹⁴² Cal Prob Code §§ 259 (a1-a4) [Probate Code].

¹⁴³ Cal Welf & Inst Code § 15610.27 [Welf & Inst Code].

¹⁴⁴ Probate Code, *supra* note 142 § 15610.23.

¹⁴⁵ National Center on Elder Abuse, “Major Types of Elder Abuse”, online: National Center on Elder Abuse <<http://www.ncea.aoa.gov>>; see generally Carolyn L Dessin, “Financial Abuse of the Elderly” (1999-2000) 36 Idaho L Rev 203 at 206ff (financial abuse).

defined separately.¹⁴⁶ From the perspective of predatory marriage, the most relevant form of abuse is the financial abuse of an elder. According to the California Welfare and Institutions Code, this type of abuse occurs when a person assists in or “takes, secretes, appropriates, obtains, or retains real or personal property of an elder for a wrongful use or with intent to defraud, or both,” or if he or she does it or assists in doing it by undue influence.¹⁴⁷ According to the new definition, which came in force on January 1, 2014, undue influence means “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.”¹⁴⁸

To bar inheritance, criminal conviction of the abuser is not required, unless he or she committed one of the violations listed in section 259 (b) against an elder or a dependant adult. The list includes infliction of pain, injury or endangerment, theft, embezzlement, forgery, fraud, identity theft, and false imprisonment.¹⁴⁹

¹⁴⁶ “Physical abuse” is defined in section 15610.63 of the Welf & Inst Code, *supra* note 143; “Neglect” is defined in section 15610.57 of the Welf & Inst Code, *supra* note 143; “False imprisonment” as defined in section 368 of the California Penal Code [Penal Code] and “Financial abuse” as defined in section 15610.30 of the Welf & Inst Code, *supra* note 143.

¹⁴⁷ Welf & Inst Code, *supra* note 143 § 15610.30.

¹⁴⁸ Welf & Inst Code, *supra* note 143 § 15610.70; additionally, in determining whether a result was produced by undue influence, the victim’s vulnerability, the influencer’s apparent authority and the actions or tactics used by the influencer as well as the equity of the result need to be considered; see AB-140 Undue Influence, California Legislative Information, online: California Legislative Information <<http://leginfo.legislature.ca.gov>> [AB-140 Undue Influence].

¹⁴⁹ Penal Code, *supra* note 146 § 236, 368.

Moreover, from the time the acts of abuse occurred until his or her death, an abused person has to be substantially incapable of managing his or her financial resources or of resisting fraud or undue influence.¹⁵⁰ Further, the abuser must be acting in bad faith and he or she must “have been reckless, oppressive, fraudulent, or malicious in the commission of any of the forms of the abuse upon the decedent.”¹⁵¹ The person’s liability must be established “by clear and convincing evidence.”¹⁵²

A civil court can deprive a person liable for abuse or convicted of one of the crimes listed in section (b) of “any property, damages, or costs” awarded to the deceased’s estate that this person is entitled to under a trust, will, or on intestacy.¹⁵³ Additionally, he or she cannot serve as a fiduciary if an instrument appointing him or her for that position was executed during the time the deceased was “substantially unable to manage his or her financial resources or resist fraud or undue influence.”¹⁵⁴

Law introduced in California comprehensively addresses the problem of elder abuse.¹⁵⁵ Nevertheless, it has

¹⁵⁰ Probate Code, *supra* note 142 § 259 (a4); it is to be suspected that if an abused person did not change his or her will even if he or she could have done it, he or she wishes, in spite of the abuse, that his or her abuser inherit from him or her.

¹⁵¹ *Ibid* § 259 (a3).

¹⁵² *Ibid* § 259 (a1).

¹⁵³ Probate Code, *supra* note 142 § 259 (c).

¹⁵⁴ *Ibid*.

¹⁵⁵ Terrie Lewis, “Fifty Ways to Exploit Your Grandmother: the Status of Financial Abuse of the Elderly in Minnesota” (2001-2002) 28 Wm Mitchell L Rev 911 at 931; Seymour Moskowitz, “New Remedies for Elder Abuse and Neglect” (1998) 12 Prob & Prop 52.

been criticised as ineffective, because most cases of elder abuse are not reported as the victims of elder abuse rarely inform on the abuser, cannot access the legal system due to high legal costs, have difficulties finding a lawyer interested in taking their case, or suffer under physical or mental difficulties that stop them from being able to clearly communicate their case.¹⁵⁶ Further, it is difficult to meet the standard of proof of “clear and convincing evidence” and of “reckless, oppressive, fraudulent, or malicious” conduct.¹⁵⁷ With regard to financial abuse, changes introduced in 2014 may better “capture the nuances of elder financial abuse” and efficiently assist the fight against elder financial abuse.¹⁵⁸

Deeming a Predatory Spouse Unworthy to Inherit under Elder Abuse Law

The new American application of the consequences of the slayer rule (unworthiness to inherit) sets a precedent that can justify its employment in predatory marriage cases. Applying

¹⁵⁶ Eve M Brank, Lindsey E Wylie & Joseph A Hamm, “Potential for Self-Reporting of Older Adult Maltreatment: an Empirical Examination” (2011-2012) 19 Elder LJ 351 at 352-354, 362; Sarah S Sandusky, “The Lawyer’s Role in Combating the Hidden Crime of Elder Abuse” (2003) 11 Elder LJ 459 at 468-471; Daniel L Madow, “Why Many Meritorious Elder Abuse Cases in California Are Not Litigated” (2012-2013) 47 USFL Rev 619 at 634 (“Elderly victims often make poor witnesses”); the age-based definition of an elderly and the mandatory reporting of financial elder abuse have been also criticized, see James P Bessolo, “Mandatory Reporting Requirements for Financial Elder Abuse” (2007) Los Angeles Lawyer 23; Lewis, *supra* note 155 at 931; Richard S Leslie, “Major Revisions to Elder/Dependent Adult Abuse Reporting Law Enacted” (1998) The Therapist; Korpus, *supra* note 138 at 548.

¹⁵⁷ Madow, *supra* note 156 at 625-628 (especially with regard to physical abuse).

¹⁵⁸ AB-140 Undue Influence, *supra* note 148.

provisions of Californian law in Canadian common law provinces would allow finding a predatory spouse unworthy to inherit under the elder abuse law. The law would apply in this case, because the victim spouses are usually older than 65 years of age and, as shown hereafter, the conduct of the predatory spouse meets the requirements of financial abuse set under the California Probate Code.

A predatory spouse overwhelms his or her elderly spouse's free will through excessive persuasion and causes him or her to make new testamentary provisions. This conduct, described in the words of the California Welfare and Institutions Code, amounts to obtaining property of an elder with fraudulent intent by undue influence and thereby constitutes financial abuse under the California Probate Code.

Usually a victim spouse dies while under the control of a predatory spouse. He or she suffers from physical and mental difficulties and his or her well-being depends on the caregiver (the predatory spouse). As a result, as required by California Probate Code, the victim spouse is unable to resist the undue influence of the predatory spouse until his or her death.

Proving bad faith and reckless, oppressive, fraudulent, or malicious conduct might be difficult. However, the fact that a predatory spouse marries an elder exclusively to gain financial benefits and that the elder is not aware of it at the time of entering their marriage may be recognized as fraudulent conduct.

Finding a predatory spouse liable for financial abuse under the California Probate Code would prevent this person from inheriting from the victim spouse on intestacy. He or she would also not inherit under the victim spouse's will because, if a will is found unduly influenced, it is invalid. Further, a predatory spouse would not serve as fiduciary.

The regulations on financial abuse of the elderly provided under Californian law could be implemented in Canadian common law provinces. It could be achieved, as done in California, by extending the applicability of the consequences of the slayer rule. Both the slayer rule and elder abuse laws aim at preventing wrongdoers from benefiting from their deeds. In both cases, it could be assumed that the victim of a murder or of abuse would not want his or her killer or abuser to benefit on his or her death. Then the predatory spouse, whose conduct met the requirements of financial abuse of an elder, would be found unworthy to inherit from his or her victim. He or she would not receive any part of the victim's estate either under a will or on intestacy. Of course, the proposed solutions could have a wider scope of application, e.g. also in case of physical abuse or neglect of an elder.

Second Solution

Testamentary Undue Influence under Canadian Law¹⁵⁹

Under Canadian law, a will is considered to have been made under testamentary undue influence if a testator's will is overpowered by the will of another person and consequent testamentary dispositions express the will and wishes of this person rather than the testator's will and true intention.¹⁶⁰

¹⁵⁹ In this paper only testamentary undue influence is considered and is further referred to as "undue influence" or "testamentary undue influence." Undue influence exerted on *inter vivos* acts is not investigated; for the distinction, see Johanne L Amonson, "Rebutting the Presumption of Undue Influence" (1991-1992) 11 E & TJ 100; W H D Winder, "Undue Influence and Coercion" (1939-1940) 3 Mod L Rev 97; however, rules of testamentary undue influence apply also to acts *inter vivos* that have testamentary consequences, see Oosterhoff, "Testamentary Capacity", *supra* note 100 at 383-384.

¹⁶⁰ *Boyse v Rossborough* (1857), 6 HL Cas 2, 10 ER 1192 at page 1205 [Boyse]; *Kohut Estate v Kohut Estate* (1993), 90 Man R (2d) 245 at para 38; *Williams, Formerly Cook v Goude and Bennet* (1828), 1

However, others may legally affect a testator's will by reminding about or insisting upon factors that may influence a testator's will, including appealing "to affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution."¹⁶¹ Only influence that amounts to coercion and exceeds persuasion, suggestion, or encouragement to dispose of property in a certain way is considered undue.¹⁶² Influence of any other degree does not affect the validity of a will, even if it is subject to moral or social disapproval.¹⁶³ The coercion may be exercised in different forms depending on circumstances and testator's state of mind and body.¹⁶⁴ It may

Haggard 577, 162 ER 682 at para 581; *Wingrove v Wingrove* (1885) 11 PD 81 [*Wingrove*]; Oosterhoff, "Testamentary Capacity", *supra* note 100 at 381; Winder, *supra* note 159 at 105, 107; defined in *Craig v Lamoureux* (1919), 50 DLR 10, [1920] AC 349 at page 357 [*Craig*] as:

Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.

¹⁶¹ *Hall v Hall* (1865-69), LR 1 PD 481.

¹⁶² See *Baudains v Richardson*, [1906] AC 169 at page 184-185; *Crompton v Williams*, [1938] OR 543, [1938] 4 DLR 237 at para 52; *Parfitt v Lawless* (1869-72), LR 2 PD 462 at page 474; *Re Sample Estate* (1955), 15 WWR 193, [1955] 3 DLR 199 at para 13; *Wingrove*, *supra* note 160; however, unlike in transactions *inter vivos*, testator's free agency must be broken, see *Banton*, *supra* note 32 at 82: "It follows that the degree of influence is greater than that required to set aside *inter vivos* dispositions other than, perhaps, gifts *mortis causa*"; and Basil D Stapleton, "The Presumption of Undue Influence" (1967) 17 UNBLJ 46.

¹⁶³ *Craig*, *supra* note 160 at page 357; *Wingrove*, *supra* note 160 at paras 82-83.

¹⁶⁴ *Re Marsh Estate*, *supra* note 46 at para 10; *Riach v Ferris*, [1934] SCR 725, [1935] 1 DLR 118 at para 16.

take the form of violence; but, in some cases, psychological pressure or threat is sufficient.¹⁶⁵

A testator may be unduly influenced into making, revoking, or not revoking certain testamentary dispositions.¹⁶⁶ A court will invalidate a will made under undue influence, however, “if provisions in the will are severable so that if only part of a will were made under undue influence, that part of the will may be declared invalid and the remainder of the will admitted to probate.”¹⁶⁷

Drohung under German Law

There is no concept of testamentary undue influence under German law; however, German law recognizes that a testator can be influenced by another person through a form of coercion

¹⁶⁵ *Ibid*; *Boyse*, *supra* note 160 at page 1211; *Vout*, *supra* note 10; Silberfeld, *supra* note 13. In *Re Marsh Estate*, *supra* note 46 at para 10 the court stated that:

[...] testimony [...] must be considered in the context of an unwell, elderly lady who was dependent upon her brother-in-law for the assistance which he had been giving her. All the evidence supports the finding of a threat to withdraw assistance which in the circumstances amounted to coercion.

¹⁶⁶ Oosterhoff, *Oosterhoff*, *supra* note 81 at 240-241; e.g. *Araujo v Neto*, 2001 BCSC 935, 40 ETR (2d) 169 at para 134-142; *Hubley v Cox Estate* (1999), 181 NSR (2d) 1, 560 APR 1 at para 77; *Scott v Cousins* (2000), 37 ETR (2d) 113, [2001] OJ No 19 at para 124[*Scott*]; *Streisfield v Goodman* (2000), 40 ETR (2d) 98 at para 143.

¹⁶⁷ *Ravnyshyn v Drys*, 2005 BCSC 561, 15 ETR (3d) 251 at para 101; see *Roman Catholic Episcopal Corp. v O'Connor* (1907), 10 OWR 76, 10 OLR 666 at para 10; *Re Souch Estate*, [1938] OR 48, [1938] 1 DLR 563 at paras 13-14; but see *Scott*, *supra* note 166 at para 124.

- *Drohung*.¹⁶⁸ *Drohung* is defined under German civil law (section 123 BGB¹⁶⁹) as an announcement of future evil (disadvantage), on which occurrence or non-occurrence a threatening person claims to have affect and which will take place if the threatened person does not submit his or her will to the will of the threatening person (e.g. if he or she will not make a legal declaration that is expected from him).¹⁷⁰ The exercise of such mental coercion does not deprive the victim of his or her free will, but influences his or her will in a way that is desired by the other person.¹⁷¹

Drohung does not apply in every situation in which a person is coerced through a threat to do something, but rather

¹⁶⁸ Scholars suggest that there are two concepts under German law that are compatible with testamentary undue influence under Canadian common law: acts against good morals (*contra bonos mores*) and duress (*Drohung*). However, the second notion is found more adequate; see Ronald J Scalise Jr, "Undue Influence and the Law of Wills: a Comparative Analysis" (2008-2009) 19 Duke J Comp & Int'l L 41 at 42, 104-106: "Although German law fails to provide explicit equivalents of undue influence [...], [it does] maintain restrictions associated with certain types of incapacities or prohibitions that prevent many of the same instances of undue influence"; John P Dawson, "Unconscionable Coercion: the German Version" (1975-1976) 89 Harv L Rev 1041 at 1047; John P Dawson, "Economic Duress and the Fair Exchange in French and German Law" (1937-1938) 12 Tul L Rev 42 at 53; contra EJ Cohn & W Zdzieblo, *Manual of German Law*, 2d ed, Vol 1 (Dobbs Ferry, NY: Oceana Publications, 1968) at 288; the similarities between testamentary undue influence and *Drohung* are discussed in the following section.

¹⁶⁹ *Bürgerlichen Gesetzbuches* (Civil Code) [BGB] (English translation available online: Bundesministerium der Justiz <http://www.gesetze-im-internet.de/englisch_bgb/>).

¹⁷⁰ Holger Wendtland, *Beck'scher Online-Kommentar BGB*, 29th ed, § 123, No 25.

¹⁷¹ *Ibid.*

only if the threat is illegal, that is, if the means of threatening (e.g. physical violence), aim of the threat (e.g. committing a crime), or the connection between the means and the aim is unlawful (e.g. exploiting the person's weakness of will or his or her difficult situation).¹⁷² For that reason importunate requests do not constitute a case of "*Drohung*",¹⁷³ but a caregiver's threat to leave his or her charge does.¹⁷⁴ Further, *Drohung* does not need to be articulated, but can be implied.¹⁷⁵

Under succession law *Drohung* is discussed under sections 2078 and 2339 of BGB.¹⁷⁶ Under section 2078 of the BGB, if a testator makes or revokes a disposition *mortis causa*, including testamentary dispositions, under another person's *Drohung*, a court declares these dispositions void and, under the section 2339(1), finds the person threatening the testator unworthy of inheriting from the testator. In that case, the person threatening the testator does not benefit from the testator's estate either under a will or under the law of intestacy (section 2339 BGB).¹⁷⁷ A statutory heir is also not entitled to claim the compulsory portion.¹⁷⁸

¹⁷² Dietmar Weidlich, BGH BWNotZ 65, 348; *Palandt Bürgerliches Gesetzbuch*, 72d ed, § 2078 No 8; Wendtland, *supra* note 170 No 28-30.

¹⁷³ Wolfgang Litztenburger, RG Recht 1910 Nr 1395; *Beck'scher Online-Kommentar BGB*, 29th ed, § 2340 No 14.

¹⁷⁴ Litztenburger, *supra* note 173 No 14.

¹⁷⁵ Wendtland, *supra* note 170 No 26.

¹⁷⁶ "*Drohung*" mentioned under art 2339 BGB is an equivalent of "*Drohung*" defined under §123 of BGB; BGB, *supra* note 169 § 2339(1); Dietmar Weidlich, *Palandt Bürgerliches Gesetzbuch*, 72d ed, § 2339 No 6.

¹⁷⁷ This does not apply if the testator forgives that person or if the disposition *mortis causa* becomes or would become ineffective before the testator's death; See: Ernest J Schuster, *The Principles of German*

The will of a testator is voidable, because exercising illegal influence on a testator creates uncertainty as to how the testator would dispose his or her property if he or she were not influenced and whether the disposition made under *Drohung* corresponds to his or her will.¹⁷⁹ For the purpose of finding a

Civil Law (London: Clarendon Press, 1907) at 592; BGB, *supra* note 169 § 2345 and § 2339(2).

¹⁷⁸ Schuster, *supra* note 177 at 628. Deceased person's descendants, parents, and spouse can claim a compulsory share ("*Pflichtteil*", also translated as "compulsory portion" or "forced share") in the deceased's estate. If they are entirely or partially disinherited under testamentary dispositions, they are entitled to the cash difference between "one-half of the value of the share of the inheritance on intestacy" and what they received under the testamentary dispositions. See BGB, *supra* note 169 § 2303-2338. Notice that it is a claim under the law of obligation and it is subject to certain limitations; see Peter Gottwald, Dieter Schwab & Ewa Büttner, *Family & Succession Law in Germany* (München: C H Beck, 2001) at 137-142; Karsten Kühne, Stephan Dollinger & Dirk Krome, "Germany" in David Hayton, ed, *European Succession Laws*, 2d ed (Bristol: Jordan, 2002) at 245-246; A Röthel, "Law of Succession and Testamentary Freedom in Germany" in Miriam Anderson & Esther Arroyo i Amayuelas, eds, *The Law of Succession: Testamentary Freedom European Perspective* (Groningen: Europa Law, 2011) at 162-165; Walter Pintens & Steven Seyns, "Compulsory Portion and Solidarity Between Generations in German Law" in Christoph Castelein, René Foqué & Alan Verbeke, eds, *Imperative Inheritance Law in a Late-Modern Society* (Antwerp: Intersentia, 2009) 167; Norbert Horn, Hein Kotz & Hans G Leser, *German Private and Commercial Law: an Introduction* (Oxford: Clarendon Press, 1982) at 199. However, descendants of a person declared unworthy to inherit are not precluded from benefiting from the testator's estate, see Reinhard Zimmermann, "Unworthiness to Inherit: The Development of a Legal Rule in the Mirror of European Codifications" in Helmut Koziol & Peter Apathy, eds, *Festschrift für Helmut Koziol zum 70. Geburtstag* (Wien: Sramek, 2010) 462 at 483.

¹⁷⁹ Tobias Helms, *Münchener Kommentar zum BGB*, 6th ed, § 2339 No 23.

testator's heir unworthy to inherit (section 2339 BGB), it is irrelevant whether a testator would dispose his or her property differently if he or she knew or, in the case of impaired testators, understood the transgression.¹⁸⁰ A legal assumption is accepted that if a testator acted under *Drohung* it is their hypothetical will to disinherit the person who exercised duress over them.¹⁸¹

Further, the provisions of BGB serve as a deterrent and aim at protecting a testator's freedom of testation and the rightful order of succession.¹⁸² Section 2339 BGB implicitly denounces heir's illegal actions, as a person who transgresses a testator should not benefit from his or her act.¹⁸³ Additionally, an undesirable behaviour is penalized, because depriving an heir of his or her inheritance can be seen as a civil punishment.¹⁸⁴

Deeming a Predatory Spouse Unworthy to Inherit under Undue Influence

The consequences under succession law of the German *Drohung* (unworthiness to inherit) could serve as an example for imposing additional repercussion under testamentary undue influence. Imposing these solutions would allow for depriving a predatory spouse of any inheritance from the victim spouse's estate, even on intestacy. That would be possible because, as

¹⁸⁰ Zimmermann, *supra* note 178 at 485-486.

¹⁸¹ Helms, *supra* note 179 No 2.

¹⁸² Bogudar Kordasiewicz, ed, *System Prawa Prywatnego: Prawo Spadkowe* (Warszawa: CH Beck Instytut Nauk Prawnych PAN, 2009) at 148; Zimmermann, *supra* note 178 at 483-484.

¹⁸³ Mathias Reimann & Joachim Zekoll, *Introduction to German Law*, 2d ed (The Hague: Kulwer Law International, 2005) at 288.

¹⁸⁴ Helms, *supra* note 179 at No 23.

discussed hereinafter, the conduct of the predatory spouse could be identified under German law as *Drohung*.

One of the situations to which *Drohung* applies is the exploitation of a relationship of dependency by the stronger party.¹⁸⁵ For this reason, a compromised position of the weaker party needs to be identified. In a predatory marriage, the mentally or physically weak victim spouse relies on the help provided by the predatory spouse. The dependency is especially strong because the victim spouse is often alienated from his or her family and friends by the predatory spouse. Consequently, if the predatory spouse leaves, the elder spouse would be left without any immediate help. Fear of being abandoned and thus left without assistance makes the victim spouse even more dependent on the predatory spouse.

In a situation of dependency, demands made by the stronger party could be recognized as *Drohung*. That is the case in predatory marriage where the predator spouse's demands for a testamentary provision in his or her favour, because of the testator's dependency, could not be refused. Consequently the predatory spouse's wishes would be imposed on the victim spouse and the executed will would represent the will of the predatory spouse rather than of the victim spouse. Secondly, a will disinheriting the victim spouse's children could be found inconsistent with good morals and public policy, as it interferes with the children's moral right to share their parents' estate.

Declaring a person who unduly influenced a testator's will unworthy to inherit from the testator could be justified by the similarities between testamentary undue influence and *Drohung*. Both concepts aim at preventing giving effect to a will that was made under coercion and may not express testator's true wishes. Under both concepts a testament remains

¹⁸⁵ It would be identified as an unlawful connection between the means and the aim.

enforceable until the courts finds it invalid, and each of them applies to a situation of coercion. If testamentary undue influence would be equipped with the same consequences as *Drohung*, a predatory spouse that unduly influences testamentary provisions of a victim spouse would be deprived of any share in the victim spouse's estate under the will or on intestacy.

Finding a Predatory Spouse Unworthy to Inherit

Under both solutions a person who financially abuses (as per Californian law) or unduly influences (as per German law) a testator is declared unworthy to inherit; as a result, this person can inherit neither under the (unduly influenced) will nor on intestacy. Since the concept of unworthiness of inheriting already functions under Canadian common law, its application would have to be expanded to different circumstances (testamentary undue influence or elder financial abuse). Implementing this solution should not have significant negative side effects. Courts would apply this consequence after a testator's death, so it would not influence marriage and would not make it less accessible, stable, or easier to nullify. Apart from the predatory spouse, it would not influence the testator's family's succession rights.

If the argued solution had been applied in the case *Banton v Banton*,¹⁸⁶ Yassin would have been deprived of all the rights she acquired on Banton's death as a surviving spouse. She would have inherited nothing under the unduly influenced will or on intestacy, and would not have been entitled to any claims under family law. Unfortunately, the solution has a very narrow scope of application. A victim spouse, after being manipulated into marriage by a financially motivated predatory spouse, must be unduly influenced in executing a will in favour of the predatory spouse. For a predatory spouse to be found

¹⁸⁶ *Banton*, *supra* note 32.

unworthy to inherit, a court must declare the victim spouse's testamentary dispositions invalid owing to the predatory spouse's testamentary undue influence.

Depriving a predatory spouse of inheritance would be a severe consequence, but one commensurate with the person's conduct. Establishing undue influence proves that the predatory spouse's actions were solely financially motivated. Putting financial gain above the well-being of another person is worthy of condemnation. Further, depriving a testator of his or her inherent right to decide about his or her property's disposition is a serious transgression. Determining the division of his or her property is every person's moral and legal right. Additionally, providing severe consequences, namely, losing rights to a testator's estate, could deter predatory spouses from coercing or threatening a testator into making testamentary dispositions in their favour. The proposed outcome would thus be morally and socially just, since finding a predatory spouse unworthy to inherit would cause the estate to be distributed on intestacy among the vulnerable person's legitimate heirs.

Neither of the solutions would help in recovering money appropriated by the predatory spouse during the marriage. That would be especially problematic in situations in which the predatory spouse had access to the victim spouse's assets during his or her life. However, if an elder, as part of the estate planning, locates his or her assets in a trust, the bulk of the money is inaccessible by the predatory spouse until the elder's death.

Further, it is difficult to recognize and prove testamentary undue influence under Canadian common law. Moreover, as under German law, it is possible that most cases to which it could be applied will remain unidentified.¹⁸⁷

¹⁸⁷ Knut Werner Lange, *BGB Kommentar: Erbrecht* (München: C H Beck, 2011) at 876.

However, considering that the solution's application expresses legal, moral, and social condemnation of a person's actions and declares that person unworthy of acquiring any material or immaterial inheritance from a deceased party under this party's will or on intestacy, it is advisable that it be employed carefully and only in particularly repugnant cases.

CONCLUSIONS

It is predictable that as the society ages the number of predatory marriage cases, including those which currently binding common law cannot solve justly, will rise. There is no apparent solution that would prevent predatory marriages or their consequences. Solving the issue may require balancing the desired level of elders' protection with a number of rights they currently possess. Those solutions, however, may also affect other people and the stability of various legal institutions.

Referring to a foreign jurisdiction facilitates a need for a solution that is not available under Canadian law; however, borrowing legal concepts from a foreign jurisdiction requires caution. Even the most efficient solutions may not be acceptable unless they are compatible with the legal system of the recipient country. It is important to bear in mind that legal rules are closely connected with the social, cultural, and political environment within which they have been developed and within which they exist.¹⁸⁸

¹⁸⁸ It is further suggested that social, cultural, and political contexts should be investigated while considering legal transplants; however, in this paper, these contexts will not be examined; see e.g. Loukas A Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform-Some Fundamental Observations" (2000) 34 *Int'l Law* 1055 at 1066; Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

Regardless of the applied methodology, the problem of predatory marriages needs to attract more attention. Increasing societal awareness within may prevent elders from being exploited for financial reasons, may assist elders and their families who are trapped by caregivers in seeking appropriate help, and may stop some of the predatory spouses from benefiting from their acts. Moreover, new solutions might be proposed and the so far unsolved issue might be once and forever answered exhaustively.